

Mwangi (Migration) [2021] AATA 1597 (11 May 2021)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Eric Mbugua Mwangi

CASE NUMBER: 1931419

HOME AFFAIRS REFERENCE(S): BCC2019/3363184

MEMBER: Stephen Witts

DATE: 11 May 2021

PLACE OF DECISION: Melbourne

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DECISION: The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 11 May 2021 at 12:25pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document or false or misleading information – bank statement found to be forged – uncle initially agreed to sponsor study, then withdrew support after family dispute – claim that uncle provided statement and applicant was unaware it was bogus – possibility that applicant knew it was bogus – no compassionate or compelling circumstances justifying grant of visa – temporary visa holder partner and child with applicant in Australia – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65

Migration Regulations 1994 (Cth), Schedule 2, cl 500.217, Schedule 4, criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 15 October 2019 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
6. The applicant applied for the visa on 4 July 2019. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate made a finding that the applicant provided a bogus document or information that is false or misleading in a material particular in relation to the application for the visa.
7. The applicant appeared before the Tribunal on 11 May 2021 to give evidence and present arguments.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. According to the delegate's decision record dated 15 October 2019 the department refused the applicant's application for a student visa on the basis that the applicant provided bogus documents or information that is false or misleading in a material particular in relation to the application for the visa. In particular the delegate asserted the applicant as per our requirement of clause 500.217 did not satisfy Public Interest Criterion 4020.
15. According to the delegate on 4 July 2019 the applicant provided evidence to the Department that was considered to be a bogus document. This document was a statement of account from the First Community Bank in the name of Paul Mungai with account number 00145234121. According to the delegate in August 2019 a departmental officer contacted the financial institution to verify the financial information provided and that during this process it was found that the statement of account documentation was forged and had not been issued by the relevant financial institution.
16. According to the delegate a letter was sent to the applicant in September 2019 providing the applicant an opportunity to respond to these findings. A response was received from the applicant which stated that his uncle had agreed to sponsor his study and that because of some family dispute between him and the applicant's parents he later withdrew his support without making him aware of it and that caused the applicant to provide forged financial documents.
17. According to the delegate it noted that it is the responsibility of the applicant to ensure all documents submitted were honest and accurate and that the applicant had actually responded "yes" in his declaration that he understood that giving false or misleading information is a serious offence.
18. According to the delegate it also assessed whether there were any compelling or compassionate circumstances that exist to justify the grant of the visa and made a finding that there was not.
19. The Tribunal has considered all the material before it including evidence provided prior to the hearing and evidence given at hearing. In particular the Tribunal has considered a

submission from the applicant dated 4 May 2021 where he reiterated that his uncle had agreed to sponsor his study and that he actually wasn't aware of any problem with the financial statements, and that it was only when it was raised by the Department that he came to know that something was wrong. He referred to a "web of family misunderstanding" which led to the circumstances arising including that his mother's funds were held in Euros in Germany and were not sufficient at that time. He stated that despite his disappointment with that negative outcome he has continued his study here in Australia and that his parents have assisted him with his savings. He stated that he understands the seriousness of the events but asked the Tribunal to disregard the issue raised on the basis that he was unaware and that the matter in issue was out of his control and was caused due to a breach of trust by his uncle.

20. The Tribunal notes that the applicant is also provided some study information, personal information, family information, and financial information.
21. At the hearing, the Tribunal had a discussion with the applicant regarding the circumstances of this matter. He stated that he knew it was a serious issue and that he wanted to clarify the issue of the financial statement. He stated that he believed or assumed the statement to be correct when he submitted it. He stated that only after he submitted it when the Department told him that the information may be bogus did it occur to him that in fact it may be bogus. He stated that he had no reason to believe it was at that time. He further stated that he could have used his mother's financial statement, but he could not get it in time as his mother was living in Germany. He restated that he didn't really know that the information was bogus but understood that it now was and said that it was his responsibility to ensure that the information was correct but would hope that the Department will consider the matter more broadly and take note of his good student record.
22. The Tribunal has considered the applicant's evidence carefully and notes that the applicant has stated that it would appear that the information provided was bogus but that it was his uncle's responsibility not his and that he didn't know about it at the time. The Tribunal has considered this matter carefully and can accept that it is possible that the applicant was not clear in his own mind or didn't check the veracity of the information he provided. However, the Tribunal is mindful that it is the applicant's responsibility to ensure information provided to the department is correct. The Tribunal is also concerned that in fact the applicant may have actually known that the information provided was bogus. The Tribunal was concerned by the applicant's evidence in regard to his family misunderstanding and his relationship with his uncle and the rest of the family, and notes that this lends weight to the contention that the applicant would have known that information provided at the time needed to be checked carefully and rigorously. Upon careful consideration the Tribunal finds that the applicant has provided evidence in this matter that does not appear credible under the circumstances. After careful consideration the Tribunal finds that the applicant would have known that the information provided may have been bogus but proceeded anyway in an attempt to be granted the visa.
23. The Tribunal therefore finds that there is evidence before it that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a medical officer of the Commonwealth a bogus document as defined in s.5(1) i.e. a document that the Tribunal reasonably suspects is a document that is counterfeit or has been altered by a person who does not have authority to do so and also provided information that is false or misleading in a material particular as defined in PIC 4020(5) i.e. is information that is false or misleading at the time it is given in relation to the visa application.
24. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

25. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
26. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
27. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
28. The Tribunal had a discussion with the applicant as to whether there were any compelling circumstances that affect the interests of Australia, or whether there were any compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or eligible New Zealand citizen that justify the grant of the visa.
29. The applicant stated that there was nothing that he could particularly think of except that his partner is here with him in Australia. He stated that his partner was not an Australian citizen, or permanent resident and that she was here as a student on a temporary visa. The applicant stated that they also had just had a child. The Tribunal notes that such a child would not be an Australian citizen or permanent resident and that the applicant could return home to his home country with his family.
30. After careful consideration of this matter the Tribunal finds that there are no compassionate or compelling circumstances that affect interest of an Australian citizen or any compelling circumstances that affect the interest of Australia that justify the grant of the visa.
31. Therefore, the requirements of PIC 4020(1) and (2) should not be waived.

32. Concluding paragraphs

33. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217.
34. The Tribunal finds that the applicant does not meet the criteria for any other subclass within the class of visa sought.

DECISION

35. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Stephen Witts
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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